Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1154

OTIS ENGINEERING CORPORATION,
Petitioner,

versus

JAMES C. GUIMBELLOT,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

OTIS ENGINEERING CORPORATION,

Petitioner,

versus

JAMES C. GUIMBELLOT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Otis Engineering Corporation, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on November 4, 1971.

I

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra,

pp. 15-19. The opinion of the United States Court, Eastern District of Louisiana, New Orleans Division, Judge Lansing L. Mitchell presiding, rendered January 14, 1971, as yet unreported, appears at Appendix B, Infra, pp. 20-30.

II

Jurisdiction

The judgment of the Court of Appeals was entered on November 4, 1971. Petitioner timely filed a Petition for Rehearing by the Court of Appeals which was denied on December 16, 1971. (Appendix C, infra, at pp. 31). This petition for certiorari was filed less than 90 days from the date of denial of rehearing aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1)

III

Questions Presented

Whether a federal court in a diversity action may disregard authoritative decisions of Louisiana Courts of Appeal holding that training provided by an employer in a training school is an expense of training sufficient to validate an agreement by an employee under the provisions of Section 921 of Title 12, Louisiana Revised Statutes (Acts 1934, No. 133, as amended Acts 1962, No. 104), where the federal courts have held that training provided by petitioner to respondent in a training school, for a period of time in excess of that found sufficient in the decisions of the Louisiana Courts of Appeal, was not sufficient to validate respondent's agreement under Section 921.

Whether the Court of Appeals for the Fifth Circuit interpreted Section 921 in a manner in conflict with applicable state law by holding that Section 921 requires an employer to incur an expense of training which would provide specialists or persons highly trained to work on unusual assignments.

IV

Statutory Provision Involved

The statutory provision involved is Louisiana Revised Statutes, Title 23: Section 921 (Acts 1934, No. 133, §§1-3, as amended Acts 1962, No. 104, §§1, 2), which provides:

> "No employer shall require or direct any employee to enter into any contract whereby the employee agrees not to engage in any competing business for himself, or as the employee of another, upon the termination of his contract of employment with such employer, and all such contracts, or provisions thereof containing such agreement shall be null and unenforceable in any court, provided that in those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in, then in that event it shall be permissible for the employer and employee to enter into a voluntary contract and agreement whereby the employee is permitted to agree and bind himself that at the termination of his or her employment that said employee will not enter into the same business that employer is engaged over the same

route or in the same territory for a period of two years."

V

Statement of the Case

Petitioner manufactures oil well safety systems and control equipment, and, through its personnel, installs and services that equipment throughout the world. Prior to 1966, petitioner relied upon "on-the-job" training to train its employees, which method was described as "slipshod", and resulted in the use of employees before they were fully qualified to install and service safety equipment, with resulting increases in accident rates and customer complaints.

For those reasons, in 1966 petitioner instituted a formal training program for its employees, the primary part of which consisted in formal classroom instruction and training on a 560 foot well (with equipment to simulate below surface conditions) at a facility constructed in Dallas, Texas. The training staff prepared training manuals and other materials for use by the employees during the training program.

After an initial period of employment, an employee (known as a "wireline helper"), who is considered capable of further training, is sent, at petitioner's expense, to the training school for two weeks of intensive training.

The employee returns to his usual work as a wireline helper and when he is considered capable of further training, he is again sent, at petitioner's expense, to the training school for further instruction and training during a two week period.

Thereafter, the employee returns to his work as a wireline helper until he is considered by his supervisor to be qualified as a "wireline specialist" and capable of operating a wireline unit, generally in remote locations where constant supervision is not possible.

As petitioner did not know the extent of the direct and indirect costs involved in the formal training program, during the first year that the program was in effect, petitioner did not require an employee receiving such training to execute an agreement with regard to his employment in a competing business upon leaving petitioner's employ. Upon evaluation of those costs (approximately $2,200.00 of direct costs per trainee), from April, 1967, petitioner has required each employee, prior to attending the first training session, to sign an agreement which basically provides that as a condition to receiving such training, the employee will not, for a period of two years following the date of his termination, either for his own account or the account of another, with respect to equipment or services for, solicit sales from, nor sell to, customers of petitioner, or engage in any business which competes with petitioner within a one hundred mile radius of any office to which the employee was assigned by petitioner during the last three years of employment.

Absent such an agreement by the employees receiving training, petitioner would have to curtail a great portion of the formal training program.

Respondent was employed by petitioner in September, 1967. He executed an agreement in the aforesaid form on February 18, 1968, attended the first training session of the training school during a two week period commencing

February 19, 1968, and attended the second training session at the training school for a two week period commencing May 20, 1968. On August 5, 1968, he became a wireline specialist.

During his employment, respondent was assigned to petitioner's office in Belle Chasse, Louisiana. On February 24, 1970, respondent terminated his employment with petitioner, and, with other persons, formed a company which thereafter provided wireline services identical to those provided by petitioner to one of petitioner's customers on offshore platforms to which respondent was assigned by petitioner immediately prior to termination of his employment. Both the office of the company formed by respondent with other persons, and the aforesaid platforms, were within 100 miles of petitioner's office in Belle Chasse, Louisiana.

Petitioner filed this action in the United States District Court, Eastern District of Louisiana to enjoin respondent from violation of his agreement, reserving its right to claim damages. Petitioner's motion for preliminary injunction was denied on May 19, 1970. Following a trial on the merits, the district court entered judgment dismissing petitioner's action for the reasons set forth in Appendix B. On appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the district court was affirmed on November 4, 1971, and a rehearing was denied December 16, 1971.

VI

Federal Jurisdiction Below

Jurisdiction was invoked in the District Court under 28 U.S.C. §1332 (a), as petitioner

is a corporation organized under the State of Delaware and having its principal place of business in Dallas, Texas, respondent is a citizen of the State of Louisiana, and the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

VII

Reasons Why The Writ Should Issue

The basic reason for which the writ should issue is that the Court of Appeals, by affirming the decision of the District Court, "...has decided an important state or territorial question in a way in conflict with applicable state or territorial law..." (Rule 19, United States Supreme Court)

a.

Importance of the Question

The concern of the public with regard to the damage to the ecology of the nation as the result of the uncontrolled flow of oil and gas from wells (generally referred to as a "blowout"), is publicized daily. As to the oil and gas industry, the effect of a blowout is immediate as it frequently results in injury and death of personnel, loss of reserves or production, destruction of equipment, and damage to the ecology unless the producer takes immediate and effective action at tremendous costs amounting to millions of dollars. As to both the industry and the public, the effect is also of long term, for such events have recently caused delays in the mineral leasing of the outer-continental shelf in order to permit further investigation, study and implementation of control procedures, causing severe economic loss to those directly involved in

the exploration and development of oil and gas resources, the reduction of oil and gas reserves available to the public, and loss of revenues to the federal government.

Petitioner is representative of the industry, as it manufactures sophisticated safety systems and well control equipment, and, through its personnel, installs and services that equipment worldwide. The safety systems and control equipment, and the methods used in the installation and servicing thereof, must be sufficient to control the high pressures and energy stored beneath the soil and released through wells of great depth.

As a result of a tremendous growth of demand for its services during the last two decades, petitioner recognized that the traditional method of "on-the-job" training used in the oil and gas industry, was not sufficient to properly train its personnel and resulted in the use of employees who were not fully qualified to install and service control equipment.

In 1966, petitioner, at a large cost, instituted a training program consisting primarily of the training of its employees at a training school in Dallas, Texas, and enhancement of on-the-job training procedures. Petitioner was one of the first in its business to institute such a formal training program in only one of the many types of employment in the oil and gas industry.

The decisions of the Court of Appeal and the District Court will deter other employers in the industry, and employers in other industries, from instituting similar training programs, to the detriment of the public, of employees and of employers. Accordingly, the

failure of the Court of Appeals and the District Court to correctly apply Louisiana law, and their pronouncement of a standard of law which will hamper the institution and continuation of essential training programs, is an extremely important issue.

b.

Authorities and Their Application

The decisions of the Court of Appeals and District Court are directly in conflict with decisions of the Louisiana Court of Appeals for the Second Circuit in World Wide Health Studios, Inc. v. Desmond, 222 So. 2d 517 (1969) and the Louisiana Court of Appeals for the Fourth Circuit in National School Studios, Inc. v. Barrios, 236 So. 2d 309 (1970). Both decisions involved employee agreements similar to the one involved herein, which agreements were held by the Courts to be valid under Section 921 of Title 12, La. Rev. Stat., primarily because training was provided by the employers in the form of a formal instruction course at a training school. The training described by the courts in those cases was for a period of time which was far less than the instruction provided by petitioner to its employees, including respondent.

The Louisiana Supreme Court has not directly ruled on the issue, however, in McCray v. Cole, La. , 251 So. 2d 161, the Supreme Court cited World Wide Health Studios, Inc. v. Desmond, supra, without criticism. Thus, the aforesaid decisions of the Louisiana Courts of Appeal are the authoritative decisions of the Louisiana judiciary with regard to validity of employee agreements under Section 921 of Title 12, La. Rev. Stat., where

the employer provides training to an employee at a training school.

In the present case, the Court of Appeals disregarded the aforesaid decisions of the Louisiana Courts of Appeals. Contrary to those cases, and contrary to the language of the statute itself, the Court of Appeals holds in its decision that Section 921 requires an employer to incur an expense which would "...provide specialists or persons highly trained to work on unusual assignments." (Appendix A, p. 18)

The only decision of a Louisiana Court of Appeal cited by the Court of Appeal is National Motor Club of La. v. Conque, 173 So. 2d 238 (La., 3 Cir., 1965), in which, according to the court, the employer incurred no expense of training of the employee, and in particular, the employer did not provide training to the employee in a training school, whereas petitioner provided that form of training to respondent for a period of time in excess of that found sufficient in World Wide Health Studios, Inc. v. Desmond, supra, and National School Studios, Inc. v. Barrios, supra.

The effect of the decision of the Court of Appeals and its interpretation of La. R.S. Title 23:§921, will be to deter employers from instituting or continuing expensive, but highly essential, training programs, contrary to the decision in National Motor Club of La., Inc. v. Conque, supra, in which the Court held that La. R.S. 23:§921 was intended "... to protect the investment of those employers who afford special training of a substantial nature to their employees, and to encourage them to do so." (173 So.2d at p. 24, emphasis added).

Petitioner submits that the Court of Appeal ignored the following basic principles of the Erie Doctrine:

(1) In the absence of a decision by the state's highest court, authoritative decisions of the state's intermediate courts are binding on a federal court in a diversity action, unless there is convincing evidence that the state's highest court would rule otherwise. Six Cos. of Cal. v. Joint Highway District (1940), 311 U.S. 180, 188, 85 L.Ed. 114, 117-118, 61 S.Ct. 196; see also Stoner v. New York Life Ins. Co. (1940), 311 U.S. 464, 467, 85 L. Ed. 284, 287, 61 S.Ct. 609, Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-178, 85 L.Ed 109, 113, 61 S.Ct. 438.

(2) A federal court is required to follow authoritative decisions of law of the state courts, and disregard dicta or other expressions in a decision not needful to determination of the rights of the parties. Carroll v. Carroll, 16 How. 275, 286-287, 14 L.Ed. 936, 941 (1853); New England Mutual Life Ins. Co. v. Mitchell, 118 F.2d 414, 419-420 (4 Cir., 1941); Hertz Corporation v. Cox, 430 F.2d 1365, 1377 (5 Cir., 1970); Schultz v. Tecumseh Products, 310 F.2d 426 (4 Cir., 1962).

(3) Considered dicta of the state's highest court, is binding upon a federal court in a diversity action. Douchet v. Middleton, 328 F.2d 97 (5 Cir., 1964); Mooney Aircraft, Inc. v. Donnelly, 402 F.2d 400, 405 (5 Cir., 1968)."

The decision of the Court of Appeals is
rly contrary to the authoritative deci-
s of the Louisiana Courts of Appeal,
nd and Fourth Circuits, which involved
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which was far less than that provided
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ot be justified by the decision of the
siana Court of Appeals, Third Circuit, in
onal Motor Club of Louisiana, Inc. v.
ue, supra, as that case did not involve
xpense of training, but, at most, limited
ne-job training. The decision of the
: of Appeals may also be said to be con-
to the dicta of the Louisiana Supreme
in McCray v. Cole, supra, which is con-
ng evidence that the Louisiana Supreme
would rule contrary to the Court of Ap-
and the District Court in the present

c.

Finality of the Decision of the Court of Appeals

Although the period of time during which
oner was entitled to restrain respondent,
the provisions of the agreement signed
spondent, expired on February 24, 1972,
cision of the Court of Appeals and the
ct Court that the agreement is not valid
the provisions of Section 921, Title 12,
v. Stat., denies petitioner its right
over damages against respondent for vio-
of his agreement, which right was re-
by petitioner in these proceedings.

d.

Conclusion

The question presented is of great importance to the public which is both served by the oil and gas industry and affected by procedures employed by the industry. The industry should not be deterred from expending funds for the proper training of employees by a decision of the federal judiciary which is contrary to the authoritative decisions of the state courts; and other employers in the industry should be encouraged to follow the example of petitioner which recognized the dangers involved in the use of employees who were not fully qualified to install and service control equipment and which instituted a training program redounding to the benefit of the public, its employees, and the industry.

Respectfully submitted,

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Of Counsel

Certificate of Service

This is to certify that the within and foregoing petition for certiorari has been served on James C. Guimbellot, in five copies, by depositing the same in the United States mails, first-class postage fully prepaid, addressed to counsel for James C. Guimbellot at the last known address of said counsel, as follows: Jesse R. Adams, Jr. and Samuel C. Gainsburgh, 1718 National Bank of Commerce Building, New Orleans, Louisiana.

Sumter D. Marks, Jr.

_____ March 1972

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1381
Summary Calendar*

OTIS ENGINEERING CORPORATION,
Plaintiff-Appellant,

versus

JAMES C. GUIMBELLOT,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(November 4, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: This is a contract not to compete case governed by Louisiana law. It reaches us on appeal of the district court's decision not to enjoin Otis' former employee, Guimbellot, from engaging in the business of oil field wireline operator in competition with Otis.

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*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

Guimbellot worked for Otis for two and one-half years, during which time he received twenty days school training as a wireline operator at a cost to Otis estimated roughly at $2,000. Before attending the school, Guimbellot signed a contract not to compete for two years within a 100-mile radius of Belle Chase, Louisiana, where he was employed by Otis. The contract is straightforward but the relevant Louisiana statute and precedent are not. The statute provides:

> No employer shall require or direct any employee to enter into any contract whereby the employee agrees not to engage in any competing business for himself, or as the employee of another, upon the termination of his contract of employment with such employer, and all such contracts, or provisions thereof containing such agreement shall be null and unenforceable in any court, provided that in those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in, then in that event it shall be permissible for the employer and employee to enter into a voluntary contract and agreement whereby the employee is permitted to agree and bind himself that at the termination of his or her employment that said employee will not enter into the same business that employer is engaged over the same route or in the same territory for a period of two years.

This statute, amended in 1962 to include the proviso, indicates a state policy against contracts not to compete, but then appears to provide a simple means — any training expenditure — of circumventing this policy. The apparent contradiction has predictably spawned two contrary lines of authority in Louisiana's intermediate appellate courts. The Louisiana Supreme Court has not yet resolved the conflict.

National School Studios, Inc. v. Barrios, 236 So.2d 309 (La. App. 1970); *World Wide Health Studios, Inc. v. Desmond*, 222 So.2d 517 (La. App. 1969); and *Aetna* Fin. *Co. v. Adams*, 170 So. 2d 740 (La. App. 1964) purport to construe the statute literally, finding that the language, "incurs an expense in the training of the employee," means any expense incurred in training justifies a covenant not to compete. The conflicting cases, *Theatre Time Clock, Inc. v. Stewart*, 276 F. Supp. 593 (E.D. La. 1967); *Nalco Chemical Co. v. Hall*, 237 F. Supp. 678 (E.D. La. 1965), *aff'd* 5th Cir. 1971, 347 F.2d 90; and *National Motor Club of La. v. Conque*, 173 So. 2d 238 (La. App. 1965) require the employer to make "substantial" expenditures on "special" training before the courts will enforce a noncompetition agreement. The latter courts have reasoned that to hold *any* expense in training an employee justifies a covenant not to compete would virtually abrogate the Louisiana policy against these covenants and render the first part of the statute a nullity. Some expense is involved in training workers for even the most menial task. Surely, they reason, the legislature did not

intend to completely repeal its long-standing policy by adding the proviso.

Faced with the conflicting precedents, the district court chose to follow those requiring substantial expenditures on special training. Without stating our own preference on this issue, which can only be ultimately decided by the Louisiana Supreme Court, we hold that the district court did not err in making the choice it did. The only question that remains, therefore, is whether this case was properly decided on the basis of *Theatre Time Clock-Nalco Chemical-National Motor Club*. We think it was.

Guimbellot was schooled by Otis to be a wireline operator in Louisiana oil fields. Otis went to some length in its brief to show that this is a reasonably complicated job requiring training and experience. Over the years the company had encountered serious problems with poorly trained employees. The school that Guimbellot attended was established in response to these problems in the everyday business of Otis, not to provide specialists or persons highly trained to work on unusual assignments. The district court properly found that the training given appellee was not substantial when viewed in light of the fairly complex nature of his job. It was nothing more than normal training most job holders receive at some time during the course of their employment.

Preventing a man from engaging in his trade for two years within 100 miles of his home is a serious matter, as recognized by the Louisiana legislature. The

legislature's policy against contracts not to compete has now been modified by the statutory proviso, but we believe that until the Louisiana Supreme Court rules to the contrary federal courts are free to follow state precedent indicating such policy has not been wholly abandoned.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

MINUTE ENTRY
MITCHELL, J.
JANUARY 4, 1971

OTIS ENGINEERING CORPORATION CIVIL ACTION

VERSUS NO. 70-1038

JAMES C. GUIMBELLOT SECTION F

This matter came on for hearing on former dates on petitioner's application for the issuance of an injunction.

After considering the evidence, the arguments and briefs submitted, the Court denies petitioner's application for an injunction for the reasons set out below.

Otis Engineering Corporation, a Delaware corporation with its principal place of business in Dallas, Texas, seeks to enjoin defendant, James C. Guimbellot, a citizen of Louisiana and former employee of plaintiff, from engaging, for a period of two years from February 26, 1970, either for his own account or for the account of another, with respect to equipment or services similar to those manufactured or provided by plaintiff, from performing any services for, soliciting sales from or selling to, customers of plaintiff or engaging in any business which competes in any manner with plaintiff, within a 100-mile radius of Belle Chasse, Louisiana. Although plaintiff reserved its rights to damages and although it was invited by the Court to specifically amend its pleadings alleging a specific amount of damages, plaintiff failed to do so.

At all times pertinent hereto, plaintiff was one of the major wireline service companies in the United States.

Prior to 1966, the only manner in which an Otis employee, hired as a wireline helper, could become a wireline operator or "Specialist" was to get on the job training.

Under the grade scale set out by Otis, a Wireline Helper "D" was the lowest employee on the rung, while "A" was the highest. This same scale prevailed as to the Wireline "Operator" or "Specialist".

Otis employees testified that it took approximately twenty months to two years to become a Wireline Operator [1] and three years to become a Wireline Operator, Grade "A".[2]

Gerald A. Bosworth, a former Otis employee, testified that in June of 1963 he was employed by Otis as a Class "D" Helper and, with simple on the job training, he became a Class "D" Operator or Specialist in thirteen months. When Mr. Bosworth left Otis' employ in January of 1966, he was a Class "B" Operator.

In order to provide a source of properly trained wireline operators to take care of plaintiff's business, the Otis Training Center was established in Dallas, Texas. Training

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[1] Donald Delcambre, Administrator, Otis Training and Safety Program, Belford Carmichael, Wireless Specialist.

[2] George F. Metcalf, Area Manager, Western District, Otis Engineering Corporation.

facilities were constructed and instructors were retained and the school opened in May of 1966.[3]

Defendant, who had had no previous experience in oil or gas exploration, was first employed by Otis on September 17, 1967 as a Wireline Helper, Class "D", at a salary of $1.30 per hour. He was issued a Specialist Training Manual [4] during his initial stages of employment. Defendant worked out of Otis' Belle Chasse office, his duties consisting of the cleaning and repairing of tools and to work closely with, and comply with the instructions of, a Wireline Operator.

On January 22, 1968, defendant was promoted to Wireline Helper, Class "C", with the same duties as before.

On February 18, 1968, defendant signed a letter agreement, dated February 9, 1968, which informed defendant that he would be accepted at plaintiff's training school under the condition that should his employment with Otis terminate for any reason, he ". . . shall not, for a period of two (2) years thereafter, either for your own account or the account of another, with respect to equipment or services similar to those manufactured or provided by Otis, perform any services for, solicit sales from, nor sell to, customers of Otis or engage in any business which competes in any manner with Otis

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[3] Testimony of William V. Traeger, Vice President, Secretary and General Counsel, Otis Engineering Corporation.

[4] Plaintiff's Exhibit B.

within a one hundred (100) miles radius of . . ." Otis' Bele Chasse office.[5]

The evidence reflects that when the training school first began, those attending were not required to sign such an agreement.[6]

Defendant began his training in Dallas on February 19, 1968. He attended classes from 8 to 10 hours daily, remaining in Dallas for ten days, and was taught how to operate and service Otis equipment. Otis paid defendant's transportation to and from Dallas, and paid his hotel room and salary while he attended classes. He returned to Belle Chasse and, as a Wireline Helper, Grade "B", received further on the job training.

On May 20, 1968, defendant returned to the training school for approximately ten days to attend a Specialist II course. He was taught to handle plaintiff's specialized equipment as well as the equipment of competitors. He again returned to Belle Chasse for further on the job training and, on August 5, 1968, he was promoted to Wireline Specialist "D", thus qualified to operate and run a Wireline unit.

Thus, what took Mr. Delcambre 20 months and Mr. Bosworth 13 months, without the benefit of having attended Otis' training school, took the defendant, with specialized instructions, a little over 11 months.

5/ Plaintiff's Exhibit A.

6/ Testimony of William V. Traeger.

Defendant was promoted to Specialist "C" ovember 18, 1968, and Specialist "B" on h 17, 1969. As an operator, defendant was $2.80 per hour.

Defendant resigned on February 26, 1970, in association with two other persons, ed Western Wireline Service, a company en- ng in wireline work in and around the e Chasse area.

At the time defendant left plaintiff's oy, he was a Wireline Specialist "B". out the benefit of attending a training ol, Mr. Metcalf testified that it took three years to become a Wireline Operator, e "A". Even with the benefit of schooling, ndant had not achieved this in the two s and five months that he was employed by .

The contract provided that its validity, rpretation and construction was to be rned by Texas law. Nonetheless, the par- stipulated that Louisiana law would apply.

Though parties to a contract are free to ulate as they please, they may not stipu- contrary to public policy.[7]

The first issue to be resolved is whether ements not to compete, such as the one in case at bar, are in violation of the public cy of the State of Louisiana.

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[7] Theatre Time Clock Inc. vs. Stewart, 276 FS 593 (ED La. 1967).

Public policy encourages employees to seek better jobs or go into business for themselves, and contracts which hinder their so doing are strictly construed and rigidly scanned and declared void unless necessary for reasonable protection of the employer.[8]

Louisiana's policy is clearly expressed by statute [9] which provides:

> "No employer shall require or direct any employee to enter into any contract whereby the employee agrees not to engage in any competing business for himself, or as the employee of another, upon the termination of his contract of employment with such employer, and all such contracts, or provisions thereof containing such agreement shall be null and unenforceable in any court, provided that in those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in, then in that event it shall be permissible for the employer and employee to enter into a voluntary contract and agreement whereby the employee is permitted to agree and bind himself that at the termination of his or her employment that said employee will not enter into the same business that employer is

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[8] 17 CJS 1137 n. 47.10.

[9] La. R.S. 23:921 as amended by Act 104 of 1962.

engaged over the same route or in the same territory for a period of two years."

Thus the contract at issue here is of the type contrary to the public policy of Louisiana and can only be enforced if the conditions with regard to training and/or advertising expenses are met.[10]

We conclude that the exception pertaining to advertising expenses is not applicable to the case at bar.

The evidence reflects that Otis advertised its equipment, service facilities and specialists in general.[11]

No evidence was introduced to show that Otis advertised the fact that defendant, James Guimbellot, was associated with its business. Where the expense of advertising is limited to the normal advertising of the employer's business and products, without any reference to the employee's connection therewith, the exception to the statute does not apply.[12]

The evidence reflects that plaintiff expended approximately $148,542.00 on its

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10/ National Motor Club of Louisiana Inc. v. Conque, 173 So2d 238 (La.App 3rd Cir.1965), cert.den. 247 La.875, 175 So2d 110; Theatre Time Clock Inc. v. Stewart, supra.

11/ Testimony of William V. Traeger.

12/ Nalco Chemical Company v. Hall, 237 FS 678 (ED La.1965) aff'd 347 F2d 90 (CA 5-1965); National Motor Club of Louisiana v. Conque, supra.

training school for the year 1968, with a total of 198 men attending the training sessions.[13]

Plaintiff contends that it spent $2,000 per trainee, however the record discloses that other expenses were added to arrive at this figure. Additionally, the evidence reveals that the school facilities were used for training persons other than Otis employees.[14]

Although some courts have held that any training expense would redeem the contract from the public policy condemnation,[15] others have concluded that the training expenses must not only be substantial but must be more than the usual or customary expenses of administration and/or supervision incurred in acquainting a new employee with his duties.[16]

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[13] Exhibit P-G; Testimony of Don Delcambre.

[14] Testimony of William V. Traeger.

[15] Aetna Finance Co. v. Adams, 170 So2d 740 (La.App-1st Cir.1964) cert.den. 247 La. 489, 172 So2d 294; World Wide Health Studios, Inc. v. Desmond, 222 So2d 517 (La.App-2nd Cir. 1969).

[16] National Motor Club of La. v. Conque, supra; Nalco Chemical Co. v. Hall, supra; Theatre Time Clock, Inc. v. Stewart, supra.

Judge West in the Nalco Chemical Company case, went a step further, observing:

> ". . . In other words, it seems quite clear that the intent of this exception is to protect an employer, to a limited extent, in cases where the employer has furnished and paid for special training whereby the employee is by virtue of such expenditure by the employer, made a specialist in the employer's employ. . .. ." (Emphasis added).

In the instant case, it is clear from the record that defendant was not rendered a wireline specialist by the two training sessions he attended in Dallas.

Although the training which defendant thought he would receive in Dallas was an inducement to enter into the contract, it is obvious from the evidence presented that defendant could have received most, if not all, of this same training on the job and thus have been promoted accordingly.

We are also of the opinion that the amount expended solely for defendant was not "substantial".

Concluding that the contract sued upon is in violation of the public policy of the State of Louisiana, plaintiff's application for injunctive relief must be denied.

Assuming, arguendo, that the training expenses incurred met the exceptions set out

in the Louisiana law,[17] the Court is still of the opinion that injunctive relief should be denied.

Before granting an injunction preventing a former employee from earning his living in his customary trade in the locale in which he has lived most of his life, the Court has a duty to weigh all of the facts and circumstances and, in particular, to ascertain that his former employer is suffering substantial harm.[18]

In order to be entitled to injunctive relief petitioner must show irreparable injury.[19]

Although petitioner alleged that defendant has solicited former customers and it has suffered a loss of income because of defendant, the evidence failed to substantiate these allegations. On the contrary, the testimony revealed that the reason Signal Oil & Gas Company fired the Otis Wireline Operator from the West Delta Block 79, Gulf of Mexico, had nothing whatever to do with defendant's

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17/ La. R.S. 23:921; see National School Studios Inc. v. Barrios, 336 So2d 309 (La.App. 4th Cir.-1970).

18/ See Corbin on Contracts, Sec. 1394, p. 101 et seq.

19/ World Wide Health Studios, Inc. v. Desmond, supra; La. CCP 3601.

solicitation of Signal, but simply had to do with Otis personnel. The evidence further revealed that before Signal contacted defendant to complete the job, it had first contacted two other companies.[20]

Let judgment be entered accordingly, dismissing plaintiff's suit at its costs.

There is still pending before us defendant's motion seeking to enjoin Otis Engineering Corporation from prosecuting a state court action,[21] involving this same matter, until this action is disposed of on the merits.

Since our opinion herein will now dispose of this case, on its merits, defendant's motion has become moot.

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[20] Testimony of George Robbins, Signal Oil & Gas Company.

[21] Otis Engineering Corp. v. James C. Guimbellot, 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, DKT. No. 12-932, Division B.

FILED

DEC 16 1971

EDWARD W. WADSWORTH
CLERK

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1381
Summary Calendar*

OTIS ENGINEERING CORPORATION,
Plaintiff-Appellant,

versus

JAMES C. GUIMBELLOT,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

December 16, 1971)

ON PETITION FOR REHEARING

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.